81-2149

NO. 82-

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

HERMAN SOLEM, WARDEN, SOUTH DAKOTA STATE PENITENTIARY,

Petitioner,

vs.

NORMAN STUMES,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

TIMOTHY J. McGREEVY
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Counsel for Respondent

INTRODUCTION

The Petitioner, Herman Solem, has served and filed a Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit. This Brief is presented on behalf of the Respondent in opposition to the Petition for a Writ of Certiorari, in accordance with Rule 22 of the Rules of the Supreme Court.

SUMMARY

Norman Stumes (the Respondent) was convicted of manslaughter in a South Dakota State Court in 1974. State vs. Stumes, 241 N.W. 2nd 587 (S.D. 1976). His petition for a Writ of Habeas Corpus was denied by the District Court. Stumes vs. Solem, 511 F. Supp. 1312 (D.S.D. 1981). On appeal, the Eighth Circuit Court of Appeals reversed and remanded. Stumes vs. Solem, Eighth Circuit, March 1, 1982. The State has now petitioned for a Writ of Certiorari.

ARGUMENT AND AUTHORITIES

The Respondent submits that pursuant to Rule 17 of the Rules of the Supreme Court, this is not a proper case for the grant of a Writ of Certiorari. As Rule 17 indicates, review on Writ of Certiorari is "...not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefore."

The Petitioner suggests in his Petition that the following questions are presented for review:

1. When does a conversation begin and end?
2. Should an Appellate Court be permitted to find facts without first allowing the State Court or Federal District Court to find the facts?
3. Should Edwards v. Arizona be applied retroactively?

There surely can be no reasonable doubt but that question one and question two do not rise to the level of legal importance which would support the grant of a Writ of Certiorari.

The Petitioner is just plain wrong to suggest that the Court of Appeals in this matter made factual determinations. The District Court, which was in a proper position to decide the facts in this matter, clearly and unequivocally regarded the events of October 2 to constitute a single session of questioning. (See page 12 of the slip opinion from the Eighth Circuit, made a part of the Petition in this matter.) The divergence between the District Court and the Court of Appeals arises not because of a different result factually, but because of a different legal analysis. The majority opinion in the Eighth Circuit

Court of Appeals clearly agrees with the District Court's general factual finding that the automobile trip on October 2 constituted a single session of interrogation. (See page 14 of the slip opinion from the Eighth Circuit, made a part of the Petition in this matter.)

It is only with regards to question three presented by the Petitioner that a colorable argument can be made that the grant of a Writ may be appropriate. Even then, however, a fair analysis suggest that it would be improvident for the Court to grant the Writ requested by the Petitioner.

The Petitioner in the Eighth Circuit Court of Appeals never once suggested in that Court that the "retroactivity" of Edwards v. Arizona, 451 U.S. 477, 101 S. Ct. 1880, 68 L. Ed.2nd 378 (1981), was a matter of concern in this case, until after the decision of the Eighth Circuit was announced. The applicability of Edwards v. Arizona was briefed and argued by the Petitioner in the Eighth Circuit upon its merits with never a suggestion that it was inapplicable.

Furthermore, the Respondent respectfully suggests that retroactivity is in fact not at issue in this matter. A fair reading of Edwards indicates that it does not constitute new law. Instead, Edwards serves to elucidate the specific applicability of Miranda vs. Arizona, 384 U.S. 436, 86 S. Ct. 1602 (1966), and Escobedo vs. Illinois, 378 U.S. 478, 84 S. Ct. 1758 (1964), in certain factual settings.

In reality, Edwards constitutes an example of the proper application of the standards announced in earlier decisions. In short, earlier decisions had held that a suspect had a right to counsel, and the right to be so advised. Edwards, in effect, declared to the police that when you tell a suspect he has the right to counsel, and a request for counsel is made, the right and the request must be respected. Edwards made clear that mere lip service to constitutional standards would not suffice.

CONCLUSION

Your Respondent respectfully submits that circumstances are totally lacking in this matter such as to justify the grant of the Writ of Certiorari. Therefore, your Respondent requests that the Petition in this matter be denied.

DANA, GOLDEN, MOORE & RASMUSSEN
AND TIMOTHY J. McGREEVY

Timothy J. McGreevy
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Sioux Falls, SD 57102

CERTIFICATE OF SERVICE

I hereby certify that three copies of the Brief in opposition to the Petition for a Writ of Certiorari to the Eighth Circuit Court of Appeals in the case of Norman Stumes vs. Herman Solem, was served by United States mail, first class, postage prepaid upon Mark V. Meierhenry, Attorney General, State Capitol, Pierre, South Dakota, 57501 on this 25th day of May, 1982.

DANA, GOLDEN, MOORE & RASMUSSEN
AND TIMOTHY J. McGREEVY

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MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Comes now Norman Stumes, Respondent above named, by Timothy J. McGreevy, his appointed counsel pursuant to the Criminal Justice Act, in the Eighth Circuit Court of Appeals, and respectfully moves the Court for leave to proceed in Forma Pauperis. The undersigned further represents to the Court that he has been and continues to serve as appointed counsel for the Respondent above named, in connection with this matter both in the Eighth Circuit Court of Appeals, and in the United States District Court for the District of South Dakota. The undersigned's appointment as counsel has been on the basis that the Respondent is an indigent, and has been pursuant to the Criminal Justice Act.

Dated at Sioux Falls, South Dakota, this 24th day of May, 1982.

DANA, GOLDEN, MOORE & RASMUSSEN
AND TIMOTHY J. McGREEVY

By Timothy J. McGreevy
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that Motion for Leave to Proceed in Forma Pauperis was served upon Mark V. Meierhenry, Attorney General of the State of South Dakota, State Capitol, Pierre, South Dakota, by mailing to him a true and correct copy thereof by first class mail, postage prepaid, to his respective mailing address, this 25th day of May, 1982.

DANA, GOLDEN, MOORE & RASMUSSEN
AND TIMOTHY J. McGREEVY

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